UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANON U.S.A., INC. and CANON FINANCIAL SERVICES, INC.,

Plaintiffs,

-against-

DIVINIUM TECHNOLOGIES, INC., formerly known as EZ DOCS, INC. d/b/a OFFICE AUTOMATION SYSTEMS and d/b/a VISTA DIGITAL SOLUTIONS, ANTHONY J. GRIMALDI, STEVEN HERNANDEZ, CATHERINE MATTIUCCI, LEONARD J. HARAC, JAY J. FREIREICH and BRACH EICHLER LLC,

Defendants.

Case No. 15-cv-01804-PAC

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR LEAVE TO AMEND COMPLAINT TO ASSERT CLAIM ON BEHALF OF CANON U.S.A., INC. AGAINST DEFENDANTS JAY J. FREIREICH AND BRACH EICHLER LLC FOR VIOLATION OF NEW YORK JUDICIARY LAW § 487

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PRELIMINARY STATEMENT

In their opposition (the "Opposition"), the Attorney Defendants[1] concede that Canon's proposed amendment would cause them no prejudice whatsoever, and is not sought in bad faith or with a dilatory motive. *See* Opposition at 13. The Attorney Defendants instead distort irrelevant issues of fact and cite inapposite authority in a weak attempt to persuade the Court that the amendment would be futile. Yet the relevant allegations and controlling law establish beyond legitimate dispute that the proposed Amended Complaint ("AC") not only states a valid claim under Section 487, but is well-grounded in indisputable documentary evidence.

The Opposition, however, does more than merely distort irrelevant facts and cite inapposite authority. As Canon has previously noted, and as the subject matter of the proposed Section 487 claim makes clear, the Attorney Defendants have a disturbing track record of making knowingly false assertions of fact to courts, including to *this* Court in *this* action.[2] Remarkably, the Attorney Defendants have, *yet again*, in opposition to this very motion, made deceitful factual assertions to this Court that are belied by documents *drafted by the Attorney Defendants themselves.*

Given that the Opposition's fanciful version of the facts is so easily disprovable by record evidence, the Attorney Defendants' compulsion to mislead this Court (and the New York state court in the Termination Lawsuit) would be comical, if such improper and unethical behavior were not so serious. The Attorney Defendants' serial misrepresentations have obliterated their credibility, and they must be held accountable for their proclivity to deceive the courts.

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[1] Unless otherwise specified, capitalized terms are defined as set forth in Plaintiffs' moving brief [ECF No. 90].

[2] In opposition to Canon's motion to compel documents withheld by the Attorney Defendants on the basis of privilege, the Attorney Defendants falsely stated that Freireich "was not retained by Grimaldi, Hernandez and Mattiucci until December 4, 2008, *after* Canon USA had already approved EZ Docs' acquisition of OAS." ECF No. 72 at 3. Canon debunked this assertion in its reply brief on the basis of irrefutable documentary evidence. *See* ECF No. 74 at 2-3.

ARGUMENT

I. The Section 487 Claim Is Not Futile

In assessing whether a proposed amendment would be futile, courts apply "the familiar standard of Federal Rule of Civil Procedure 12(b)(6)," under which they "must determine if the proposed amendment contains sufficient factual matter which, accepted as true, states a claim that is plausible on its face." *Salomon v. Adderley Indus., Inc.*, 960 F. Supp. 2d 502, 508 (S.D.N.Y. 2013) (Crotty, J.) (quotation omitted). Courts routinely reject defendants' arguments that "go to the merits of plaintiffs' proposed additional claim, rather than the sufficiency of the proposed allegations," or "rely completely on information outside of the pleadings" which is "not properly considered on a motion to amend." *See Max Impact, LLC v. Sherwood Grp., Inc.*, 2012 U.S. Dist. LEXIS 126293, at *10 (S.D.N.Y. Aug. 16, 2012) (collecting cases).

A. Canon Has Clearly Alleged Intentional Deceit and Collusion

A Section 487 claim may be based upon "any oral or written statement related to a proceeding and communicated to a court or party with the intent to deceive." *Amalfitano v. Rosenberg*, 533 F.3d 117, 123 (2d Cir. 2008). "A single act or decision, if sufficiently egregious and accompanied by an intent to deceive, is sufficient to support liability." *Id.*

Here, the AC clearly alleges that the Attorney Defendants "knowingly made deceptive, false and fraudulent assertions of fact concerning EZ Docs' ownership, control and management in pleadings and other documents that they prepared and caused EZ Docs to file with the court in the Termination Lawsuit, and in doing so colluded with Defendants EZ Docs, Grimaldi, Hernandez and Mattiucci to deceive the state court and Canon USA." *See* AC ¶ 299.[3] Accepting

[3] The AC carefully details the deceptive statements drafted and submitted by the Attorney Defendants in the Termination Lawsuit. The AC also describes the documentary evidence obtained to date proving that the Attorney Defendants knew their statements to the court were false. *See* AC ¶¶ 165, 291-299.

these allegations as true and drawing inferences in Canon's favor, the AC surpasses the liberal pleading standard of Rule 8(a) and would withstand a motion to dismiss under Rule 12(b)(6).

1. **The Attorney Defendants' "Advocacy" Argument Is a Red Herring Based Upon Further Intentional Misrepresentations to This Court**

Incredibly, the Opposition's lead argument is that the Attorney Defendants' allegedly false and deceitful representations were made "at their client's request . . . to advance a position" that EZ Docs wished to take, and that by following their client's instructions to take such a "position," they were merely engaging in "advocacy on their client's behalf" that "cannot be considered a violation of Judiciary Law § 487." *See* Opposition at 5-6. To state the obvious, colluding with clients to knowingly deceive a court and suborn perjury is not consistent with zealous advocacy, and provides no safe harbor from Section 487 violations.

To begin with, the Attorney Defendants' "advocacy" excuse is a red herring. The Opposition fails to contest the sufficiency of the AC's allegations, which must be accepted as true for purposes of the motion. Moreover, the Attorney Defendants' excuse "go[es] to the merits of plaintiffs' proposed additional claim, rather than the sufficiency of the proposed allegations" and improperly "rel[ies] completely on information outside of the pleadings." *See Max Impact, LLC*, 2012 U.S. Dist. LEXIS 126293, at *10.

But the Attorney Defendants' advocacy "excuse" is not only misplaced; it is a troubling, yet all too familiar indication of the lack of seriousness with which they appear to take their obligations as officers of the court. The Attorney Defendants rely exclusively upon what appears to be an email thread between themselves and their former clients on the eve of the filing of the Termination Lawsuit. The thread is attached to the Opposition declaration of their counsel, Jonathan B. Bruno. *See* ECF No. 92-2. In the thread, EZ Docs offers a number of patently false points upon which to base the Termination Lawsuit's premise that Canon USA's termination of

EZ Docs' dealership on the basis of fraud was improper. Such points – repeated *seriatim* on page 5 of the Opposition – include that it was "EZ Docs' position and belief that Mattiucci was the sole owner and President of EZ Docs," and "Grimaldi and Hernandez felt more comfortable having Mattiucci sign the paperwork that would make them owners in the background because Mattiucci was nervous that her ex-husband would find out and try to take the business away."

Notwithstanding the demonstrable falsity of the points raised in their clients' emails, the Opposition deceptively states that "[i]t was clearly EZ Docs' position and belief that Mattiucci was the sole owner and president of EZ Docs, and that the documents Canon claims demonstrate the [Attorney] Defendants' deceit were actually prepared to protect Mattiucci's position." *See* Opposition at 5. This statement is both remarkable and disconcerting, as the Attorney Defendants know it is false. As detailed in Canon's moving brief, the Attorney Defendants drafted the very documents that structured EZ Docs to defraud Canon USA. As but one example, the Nominee Declaration expressly acknowledges the fraud: "It is believed that Canon was and is unwilling to permit the said ANTHONY GRIMALDI and STEVEN HERNANDEZ to have any ownership interest in a Canon licensed dealership." *See* ECF No. 89-14.

Such documents put the lie to the assertions reflected in the emails upon which the Attorney Defendants' advocacy "excuse" is based. The Attorney Defendants have also apparently forgotten that they *judicially admitted* that they knew EZ Docs' ownership and control was structured to intentionally deceive Canon USA. In successfully moving to dismiss Mattiucci's state court malpractice action, Mr. Bruno submitted papers unequivocally stating that the "Nominee Declaration" established that Mattiucci "was acting as the nominee for Grimaldi and Hernandez *so that EZ Docs could conduct business with Canon*" (emphasis supplied).[4]

[4] A copy of Mr. Bruno's Affirmation was submitted as Exhibit O to Canon's moving papers. *See* ECF No. 89-15.

It is thus abundantly clear that the Attorney Defendants "advance[d] a position" at "their client's request" they knew to be false, in violation of Section 487. It is also clear that the Attorney Defendants seek to perpetuate that deception now by seeking safe harbor for their material misrepresentations based upon the exact collusion that Section 487 is designed to deter.

2. Canon's Alleged "Knowledge" Is Irrelevant

The Attorney Defendants argue, albeit erroneously, that Canon was not defrauded because its employees allegedly interacted with Grimaldi and Hernandez during the tenure of EZ Docs' dealership. *See* Opposition at 6. This contention is irrelevant to the instant motion.[5] If and when Canon became aware of Grimaldi and Hernandez's affiliation with EZ Docs is unrelated to the Attorney Defendants' deceit in the Termination Lawsuit. Any alleged "knowledge" would hence have no bearing upon whether the AC sufficiently states a claim against the Attorney Defendants under Section 487.

B. Canon Has Clearly Alleged Proximate Cause

To survive a motion to dismiss, a plaintiff "need only allege, not prove, the proximate cause element" of its claim. *See Gottlieb, Rackman & Reisman, P.C. v. Zencolor Corp.*, 2015 U.S. Dist. LEXIS 90345, at *12 (S.D.N.Y. July 10, 2015) (denying motion to dismiss legal malpractice claim); *see also Kirk v. N.Y. State Office of Cmty. Renewal,* No. 1:10-CV-00110 (NAM/RFT), 2011 U.S. Dist. LEXIS 7804, at *17 n.3 (N.D.N.Y. Jan. 27, 2011) ("Because the Court is required to accept the facts alleged in the complaint as true, proximate cause is not an issue resolved on a motion to dismiss").

Here, the AC clearly alleges that Canon USA incurred legal expenses as a proximate result of the Attorney Defendants' material misrepresentations. Indeed, the AC specifically

[5] This contention is also inappropriately based upon documents outside the four corners of the AC. *See* Bruno Aff. Ex. E [ECF 92-5].

asserts that Canon USA was forced to defend the Termination Lawsuit, which "was grounded in EZ Docs' principal position, based upon material misrepresentations of fact, that Canon USA's stated basis for terminating EZ Docs' dealership was erroneous, and that Mattiucci, and not Grimaldi and Hernandez, at all times owned and controlled EZ Docs." *See* AC ¶ 164.[6] Such allegations are more than sufficient to survive a motion to dismiss.

In an attempt to avoid the AC's clear allegations, the Attorney Defendants claim that "the crux of the Termination Lawsuit was EZ Docs' contention that the termination violated the written notice provision of the Agreement." *See* Opposition at 7-8. This argument at best raises an issue of fact that is not ripe for present adjudication. Canon is nevertheless compelled to point out the absurdity of the Attorney Defendants' position.

As an initial matter, the Opposition *admits* that Canon USA's termination of EZ Docs' dealership on the basis of fraud was "part and parcel of [the Termination Lawsuit]." *See* Opposition at 12.[7] Further, EZ Docs' complaint in the Termination Lawsuit explicitly alleges that Canon USA's "purported termination of [EZ Docs' dealership], upon the various grounds stated in their termination letter . . . constituted a breach of the Agreement."[8] The relief EZ Docs sought in its complaint consisted of either "enjoining" Canon USA from enforcing the termination in its entirety (not just for thirty days), or an order directing Canon USA to "rescind" the termination in its entirety.[9] Furthermore, the *only* evidence EZ Docs submitted in support of its application for injunctive relief was Mattiucci's perjurious affidavit,[10] which says nothing about Canon USA's alleged failure to provide notice of termination, and instead is devoted almost entirely to contesting Canon USA's assertion that Grimaldi and Hernandez controlled EZ Docs. And tellingly, the same email thread – submitted by the Attorney Defendants in a futile attempt to cast their collusion as advocacy – undermines their proximate cause argument. It discusses at length the merits of Canon USA's decision to terminate EZ Docs' dealership.[11]

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[6] *See also id.* ¶¶ 165, 294-98 ("The materially deceptive, false and fraudulent assertions were the basis for, and went to the heart of the allegations in, the Termination Lawsuit. The Termination Lawsuit could not have gone forward in the absence of such material misrepresentations."); *id.* ¶ 303 ("Freireich's and Brach Eichler's conduct in violation of N.Y. Judiciary Law § 487 injured Canon USA, which was obligated to expend considerable sums, in attorneys' fees and related expenses, to defend itself in the Termination Lawsuit").

[7] The Opposition states that "it is evident that the issue of the roles of Mattiucci, Hernandez and Grimaldi in EZ Docs and any potential fraud perpetrated on Canon – while not the sole basis for the filing of the Termination Lawsuit – certainly were part and parcel of that litigation."

[8] *See* Complaint ¶ 18 [ECF No. 89-4].

[9] *See id.* at 4-5.

Thus, it is readily apparent that the Termination Lawsuit was commenced to seek the indefinite preservation of EZ Docs' status as an authorized Canon retail dealer. To accomplish that, it was necessary for EZ Docs to refute Canon USA's stated basis for terminating EZ Docs' dealership, *i.e.*, that EZ Docs defrauded Canon USA by falsely presenting Mattiucci as the sole principal and owner of the company. Accordingly, the foundation upon which the Termination Lawsuit was built consisted of the false representations made to the court concerning EZ Docs' ownership and control. Canon USA has therefore adequately alleged – and will prove – proximate cause. *See, e.g., Melcher v. Greenberg Traurig LLP*, 135 A.D.3d 547, 552 (1st Dep't 2016) (Section 487 plaintiff "may recover the legal expenses incurred as a proximate result of a material misrepresentation in a prior action").

C. The Section 487 Claim Is Properly Asserted in This Action

The Attorney Defendants aver that Canon USA was required to assert its Section 487 claim in the Termination Lawsuit and cannot do so here. *See* Opposition at 9. In making this fallacious argument, they completely ignore controlling authority cited in Canon's moving brief.

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[10] *See* Mattiucci Aff. [ECF No. 89-5].

[11] In that thread, Grimaldi provides a litany of grounds for contesting the validity of Canon USA's bases for terminating EZ Docs' dealership. For instance, Grimaldi states that "Canon's claim that they don't allow high level managers with any kind of criminal record is nonsense," "[w]hat they are doing is a CRIME and they are heartless," "[t]his is a ploy for them to take over all of our accounts," "[y]ou tell me what AMERICAN judge would see the facts and side with them???," and "I want them to know a little about what's coming in wave 2 without getting off the point of getting this seizure lifted for 30 days." *See* ECF No. 92-2 at 2-3.

For instance, Canon cited *Melcher*, a 2016 decision in which the Appellate Division, First Department held that where, as here, a plaintiff "seeks to recover lost time value of money and the excess legal expenses incurred . . . as a proximate result of defendants' alleged deceit," a Section 487 claim properly may be asserted "in a separate action under the Judiciary Law." 135 A.D.3d at 552. Ignoring *Melcher*, the Attorney Defendants launch into a distorted recitation of supposed facts to contend that Canon USA was "aware" of the basis for the proposed Section 487 claim during the pendency of the Termination Lawsuit (but not at the actual time of the deceit), and therefore should have asserted the claim in that action. *See* Opposition at 9-11. This ill-considered argument is yet another red herring, as a plaintiff is not required to assert a Section 487 claim in an underlying action even if it is aware of the basis for such claim during the pendency of that action. *See Melcher*, 135 A.D.3d at 553-55.[12]

The Attorney Defendants cite various cases for their position that are not only readily distinguishable,[13] but derive their authority from the inapposite case of *Yalkowsky v. Century Apartments Assocs*., 215 A.D.2d 214 (1st Dep't 1995). As Canon explained in its moving brief, *Yalkowsky* and its progeny have been limited by subsequent decisions, including *Melcher* and the

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[12] In *Melcher*, the court endorsed the plaintiff's assertion of its Section 487 claim in a subsequent action notwithstanding the facts that the plaintiff had, in the prior action, "made a motion to strike defendants' pleadings . . . on the basis that the disputed amendment was a fabrication" and "moved to disqualify [opposing counsel] for their alleged fraud on the court." 135 A.D.3d at 553-55.

[13] Several of the Opposition's citations concern improper attempts to collaterally attack a prior final judgment by the assertion of a Section 487 claim in a second action. *See Seldon v. Bernstein*, No. 09 Civ. 6163, 2010 WL 3632482 at *1 (S.D.N.Y. Sept. 16, 2010); *In re Swift*, No. 94-10285, 2016 WL 355515 at *5-6 (E.D.N.Y. Bankr. Jan. 27, 2016). Others address easily distinguishable factual circumstances. *See Sanchez v. Abderrahman*, No. 10-cv-3641, 2012 WL 1077842 at *12 (E.D.N.Y. March 30, 2012) (Section 487 claim based upon misconduct in state court proceeding should have been asserted in that "still pending" state court proceeding); *Dorchester Financial Holdings Corp. v. Banco BRJ, S.A.*, No. 11 Civ. 1529, 2016 WL 845333 at *2-3 (S.D.N.Y. March 2, 2016) (granting motion to intervene by former counsel seeking to defend himself with respect to Section 487 claim based upon alleged misrepresentations purportedly made earlier in same proceeding, and limiting holding to "this specific circumstance").

New York Court of Appeals' decision in *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14 (2009), and are inapplicable here.[14]

In any event, the Attorney Defendants' portrayal of the facts relating to the state of Canon's knowledge is erroneous and bears correction. At the time of the Attorney Defendants' Section 487 violation, Canon USA was unaware that *the Attorney Defendants* played a role in EZ Docs' deceit. The Attorney Defendants' complicity was not clear until later (*i.e.*, in August 2012), when Canon obtained documents implicating them in their former clients' fraud. The Termination Lawsuit was essentially over months prior to Canon's receipt of those documents. The Attorney Defendants withdrew as counsel in May 2012, and were not replaced, resulting in EZ Docs' default. By August 2012, Canon USA was simply waiting for the court to issue a final order dismissing the action for want of prosecution.[15]

1. The "Greater Fraud" Doctrine Applies

Even if the distinguishable *Yalkowsky* line of cases applied (which it does not), the well-established "greater fraud" doctrine is an independently sufficient basis for allowing Canon USA's Section 487 claim in this action. In response, the Attorney Defendants argue, albeit incomprehensibly, that the "greater fraud" doctrine is inapplicable.[16] *See* Opposition at 12.

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[14] In *Amalfitano,* the Court of Appeals held that "to limit forfeiture under section 487 to successful deceits would run counter to the statute's evident intent to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function." *See also Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 261-62 (S.D.N.Y. 2012) (permitting Section 487 claim to proceed in separate lawsuit because it was not seeking to "collaterally attack the adverse judgment in a subsequent action under Section 487"); *Dupree v. Voorhees*, 24 Misc. 3d 396, 402 (Sup. Ct. Suffolk Co.), *aff'd as modified,* 68 A.D.3d 810 (2d Dep't 2009) ("in view of *Amalfitano* a better reading of those Appellate Division cases," including *Yalkowsky*, "would be that a plenary action under this section may not be commenced afterwards only if its essential purpose is to give that party a means to collaterally attack the judgment in the underlying action"); *Melcher v. Greenberg Traurig LLP*, 2015 NY Slip Op 30855(U), ¶ 6 (Sup. Ct. N.Y. Co.) (rejecting application of *Yalkowsky* and its progeny, and allowing Section 487 claim to proceed in subsequent suit); *Melcher*, 135 A.D.3d at 554 (citing *Amalfitano* and declining to apply *Yalkowsky* because the plaintiff "does not, in fact, seek by this action to collaterally attack any prior adverse judgment").

[15] *See* Bruno Aff. Ex. G [ECF No. 92-7].

[16] The Attorney Defendants' "greater fraud" contention contradicts their proximate cause argument that the "crux" of the Termination Lawsuit was the subsidiary issue of whether Canon USA provided notice of termination.

The AC details dozens of frauds perpetrated by EZ Docs upon leasing companies and end-users. The Attorney Defendants' (and their clients') fraud upon the court in the Termination Lawsuit was part and parcel of this larger fraudulent scheme, as it was undertaken in an effort to preserve EZ Docs' Canon dealership so EZ Docs could continue to perpetrate fraud. This greater fraud was thus not "determined" in the Termination Lawsuit, where Canon USA was a *defendant*. The Section 487 claim may accordingly be asserted in this action. *See Specialized Industrial Services Corp. v. Carter,* 68 A.D.3d 750, 751-52 (2d Dep't 2009).

D. Res Judicata Does Not Bar the Section 487 Claim

The Attorney Defendants additionally offer the curious argument that the doctrine of *res judicata* bars Canon USA's assertion of the proposed Section 487 claim in this action. *See* Opposition at 11-12.[17] However, "[t]he doctrine of res judicata 'provides that a final judgment on the merits bars a subsequent action between the same parties over the same cause of action.'" *Burberry Ltd. v. Horowitz,* No. 12 Civ. 1219, 2012 WL 5904808 at *2 (S.D.N.Y. Nov. 26, 2012) (Crotty, J.) (quotation omitted). Here, the Attorney Defendants were not parties to the Termination Lawsuit. Moreover, the Termination Lawsuit was dismissed for failure to prosecute pursuant to CPLR 3216, which is not a "final judgment on the merits" for *res judicata* purposes. *See, e.g., Hanrahan v. Riverhead Nursing Home,* 592 F.3d 367, 369 (2d Cir. 2010).

CONCLUSION

For the foregoing reasons, Canon respectfully requests that the Court grant its motion for leave to amend the Complaint to assert a cause of action on behalf of Canon USA against the Attorney Defendants for violation of N.Y. Judiciary Law § 487.

[17] It is puzzling that the Attorney Defendants contend, on the one hand, that the alleged § 487 violation was only marginally related to the Termination Lawsuit, but on the other, that the dismissal of the Termination Lawsuit would preclude Canon USA's proposed § 487 claim.

Dated: New York, New York
July 29, 2016

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